In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 527

LARRY V. AND MARGARET E. GEER, D/B/A LARRY GEER BALLROOMS, PETITIONERS

v.

WILLIAM E. BIRMINGHAM, ET AL., AS EXECUTORS OF THE ESTATE OF E. H. BIRMINGHAM, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Iowa (R. 198-278) is reported in 88 F. Supp. 189, the opinion of the Court of Appeals (R. 290-300) in 185 F. 2d 82.

JURISDICTION

The judgment of the Court of Appeals was entered November 10, 1950. (R. 300.) The petition for certiorari was filed January 30, 1951.

QUESTION PRESENTED

Whether amounts paid by patrons of the Laramar Ballroom for admission tickets, for the checking of their wraps, and for refreshment and merchandise purchased by them are subject to the so-called cabaret tax under the provisions of Section 1700(e)(1) of the Internal Revenue Code as amended.[1]

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

> SEC. 1700 [as amended by Sec. 542, Revenue Act of 1941, c. 412, 55 Stat. 687, Sec. 622 of the Revenue Act of 1942, c. 619, 56 Stat. 798, and Sec. 3 of the Public Debt Act of 1944, c. 240, 58 Stat. 272-273]. TAX.
>
> There shall be levied, assessed, collected, and paid—
>
> * * * * *
>
> (e) *Tax on Cabarets, Roof Gardens, Etc.*—
>
> (1) *Rate.*—A tax equivalent to 20 percentum of all amounts paid for admission, refreshment, service, or merchandise, at any roof garden, cabaret, or other similar place

[1] Petitioners paid a tax of 20 percent on the amounts received from their patrons for admissions tickets to the ballroom, but they do not seek a refund of those payments. Consequently, the tax on those receipts is not involved here. If the admission receipts are not subject to the cabaret tax under Section 1700(e)(1) of the Internal Revenue Code, *infra*, they are subject to the admissions tax of 20 percent under Section 1700(a)(1) of that Code (26 U.S.C. 1700(a)(1)). However, if petitioners' dancing establishment falls within the purview of Section 1700(e)(1), the admission receipts, as well as the other receipts, would be taxable under that section.

furnishing a public performance for profit, by or for any patron or guest who is entitled to be present during any portion of such performance. The term "roof garden, cabaret, or other similar place" shall include any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise. A performance shall be regarded as being furnished for profit for purposes of this section even though the charge made for admission, refreshment, service, or merchandise is not increased by reason of the furnishing of such performance. No tax shall be applicable under subsection (a) (1) on account of an amount paid with respect to which tax is imposed under this subsection.

(2) *By whom paid.*—The tax imposed under paragraph (1) shall be returned and paid by the person receiving such payments.

* * * * *

(26 U. S. C. 1946 ed., Sec. 1700.)

Treasury Regulations 43 (1941 ed.):

Sec. 101.14 [as amended by T.D. 5192, 1942-2 Cum. Bull. 249]. *Scope of Tax.*—The term "roof garden, cabaret, or other similar place" includes any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection

with the serving or selling of food, refreshment, or merchandise. A public performance furnished at a roof garden, cabaret, or other similar place shall be regarded as being furnished for profit for purposes of this section even though the charge made for admission, refreshment, service, or merchandise is not increased by reason of the furnishing of such performance.

Where music, whether by an orchestra, a mechanical device, or otherwise, and a space in which the patrons may dance is furnished in the dining room of a hotel, or in a restaurant, bar, etc., the entertainment constitutes a public performance for profit at a roof garden, cabaret, or similar place, and the payments made for admission, refreshment, service, and merchandise are subject to the tax.

* * * * *

Examples. (1) A proprietor of a dancing establishment provides for the serving of refreshments to his patrons. An admission or cover charge is made to each patron. In this case the admission or cover charges and also the charges for refreshment, service, and merchandise are subject to the tax.

* * * * *

STATEMENT

The facts as found by the district court (R. 278-285) and concurred in by the court below (R. 291-292), may be summarized as follows:

Petitioners are a partnership composed of husband and wife. Since 1938 they have operated a

ballroom at Fort Dodge, Iowa, known as the Laramar Ballroom. The ballroom is operated in portions of two adjacent buildings leased by them. In the basement is located petitioners' business office, a checkroom, and a fountain counter. On the first floor of those buildings is a dance floor, 58 x 100 feet, a lounge with a seating capacity of 43 people, and a small lobby in which is located a box office where tickets for admission to the ballroom are sold. A balcony is located on the second floor overlooking the dance floor. The balcony is approximately 8 feet wide and extends around the entire dance floor at a height of 10 feet. The balcony contains a fountain counter and 38 booths which seat 152 people. Another room, 20 x 70 feet, in the adjacent building, connected with the dance floor by two entrances, contains another fountain counter and 35 booths which seat 140 people, but no area for dancing. On certain nights 32 additional seats are provided for ballroom patrons by the placing of 32 steel folding chairs around the edge of the dance floor. The total seating capacity of the space occupied by the petitioners is about 350, not including the folding chairs. The dance floor itself can accommodate 2,000 people. The ratio of seating capacity to dance floor capacity is 17½ percent. (R. 278-279.)

During all of the time the Laramar Ballroom has been operated by petitioners, admission thereto

could be obtained only by the purchase of a ticket at the box office located in the lobby just inside the street entrance and the presentation of such ticket to a ticket taker stationed at the door connecting the lobby with the dance floor. The purchase of an admission ticket entitled the purchaser to dance the entire evening without further charge. Such admission ticket also entitled the purchaser to use the seats in the lounge and the seats in the room in the adjacent building without further charge. The number of people who purchased admission tickets to the ballroom and who did not avail themselves of the dancing privileges there afforded was, and is, negligible. The purchaser of an admission ticket could rent one of the booths in the balcony for 60 cents per evening, or could use one of those booths without additional charge until it was rented to another patron. In the year 1948 the total receipts from booth rentals amounted to approximately one half of one percent of the total receipts of the ballroom. (R. 279-280.)

Petitioners held dances in their ballroom regularly on Thursday, Saturday and Sunday nights, starting in September and ending in May of each year. They also held dances there on national holidays not falling on one of the regular operating days. Dance bands or orchestras of local and national reputation furnished music for the dances. Entertainment distinct and separate

from the dance music has not been provided at any time. (R. 280.)

On dance nights the music for the dancing begins at 8:30 P. M. and ends at 12:30 A. M. of the following day with two ten minute intermissions for the orchestra during the evening. Except for these intermissions, and for the time taken by the members to turn their music, the dance music is continuous. The members of the orchestra do not leave the orchestra platform except during the intermissions. The ballroom is open approximately 30 minutes before the dance music starts, and is closed as soon after the music stops as the patrons can get their wraps and leave. (R. 280.)

The regular established admission charge to petitioners' ballroom is 55 cents on Thursday nights prior to 9:00 P. M. and 65 cents after that hour; 65 cents for Saturday nights and 75 cents for Sunday nights. These prices include the federal admissions tax under Section 1700 (a) (1) of the Internal Revenue Code (26 U.S.C. 1700 (a)(1)). (R. 281.)

From the time the ballroom opens on dance nights and until the dance music ends, the only items which petitioners have available for sale to their patrons are soft drinks, peanuts, popcorn, candy, gum, and cigarettes. Waitresses are available from whom these items may be ordered by patrons seated in any booth. Patrons may also purchase these items at any one of the three foun-

tain counters. With the exception of cigarettes, which for a time were sold at twenty cents per pack, the prices charged for these refreshments and merchandise have remained constant and are the same charged for them at other retail outlets. There are no menus provided in connection with the sale of these items, and no meals or sandwiches are served by the petitioners at any time. There are no facilities for cooking in the ballroom and no silverware or table linen. The only dishes used are water glasses and popcorn bowls. In the operation of their establishment petitioners always represented and advertised it as a ballroom or dance hall with dancing as the sole entertainment. They had never represented or advertised it as a place where meals or other food was dispensed. During the year 1948, the average amount spent by a patron for the items of refreshment and merchandise referred to was twenty-seven cents. (R. 281-282.)

Since 1939 a checkroom has been provided for those patrons who wish to check their wraps. A charge of ten cents is made for this service. The checking of wraps is optional with the patrons. (R. 282.)

For the year 1948 the receipts from the sale of admission tickets constituted approximately sixty-seven percent of the gross income of the establishment, receipts from the sale of refreshments approximately 27 percent, and receipts from the checkroom approximately 6 percent (R. 282).

On December 2, 1948, the United States Collector of Internal Revenue for the State of Iowa demanded that petitioners pay the cabaret tax of 20 percent under Section 1700(e) of the Internal Revenue Code, *supra*, pp. 2-3, on their receipts covering admissions, wrap checking, and sales of merchandise and refreshments (R. 98, 162, 164). Petitioners paid the cabaret tax and, after their timely claim for refund had been denied, brought this action against the collector in his individual and official capacities to recover a refund of the cabaret tax paid by them on their receipts covering wrap checking and sales of merchandise and refreshments[2] (R. 1-4, 8-13). The district court, after overruling the collector's motion to dismiss, held that the receipts from petitioners' ballroom were not taxable under Section 1700(e)(1) of the Internal Revenue Code, and accordingly entered judgment in favor of petitioners. On appeal to the Court of Appeals for the Eighth Circuit, that court reversed the judgment of the district court and remanded the case with directions to dismiss the complaint (R. 291-300). The collector, E. H. Birmingham, having died on November 20, 1950, his executors, respondents here, were substituted in his stead on January 8, 1951 (R. 304).

ARGUMENT

1. Petitioners advance several somewhat tortuous arguments (Br. 36-65) in an endeavor to show

[2] See footnote 1, *supra*, p. 2, with respect to the admission receipts.

"Section 101.14 (as amended by T. D. 5192, 1942-2 Cum. Bull. 249). *Scope of Tax.*—The term 'roof garden, cabaret, or other similar place' includes any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise. A public performance furnished at a roof garden, cabaret, or other similar place shall be regarded as being furnished for profit for purposes of this section even though the charge made for admission, refreshment, service, or merchandise is not increased by reason of the furnishing of such performance.

Where music, whether by an orchestra, a mechanical device, or otherwise, and a space in which the patrons may dance is furnished in the dining room of a hotel, or in a restaurant, bar, etc., the entertainment constitutes a public performance for profit at a roof garden, cabaret, or similar place, and the payments made for admission, refreshment, service, and merchandise are subject to the tax.

. . . . . .

Examples. (1) A proprietor of a dancing establishment provides for the serving of refreshments to his patrons. An admission or cover charge is made to each patron. In this case the admission or cover charges and also the charges for refreshment, service, and merchandise are subject to the tax."

that the decision of the court below is in conflict with decisions of this Court because of its failure to apply various principles of statutory construction, but the sum of their contentions amounts to no more than an assertion that the court below erred in construing the language of Section 1700(e)(1) of the Internal Revenue Code, as amended, to impose the cabaret tax on the receipts of their dancing establishment.

Section 1700(e)(1) of the Internal Revenue Code, as amended, *supra,* pp. 2-3, imposes an excise tax of 20 percent (commonly referred to as the cabaret tax) on the amounts paid for admission, refreshment, service, or merchandise at any roof garden, cabaret, or other similar place funishing a public performance for profit. The term "roof garden, cabaret, or other similar place" is defined by the section to include "any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise."

In construing the language of Section 1700(e)(1), the court below held that petitioners' dancing establishment fell within the reach of the section with regard to both the character of the establishment and the nature of the entertainment furnished to petitioners' patrons, *i.e.*, the music and

dancing privileges were afforded in connection with the serving of refreshments, and the music and dancing privileges furnished constituted a public performance for profit within the meaning of that term as used in the said section. In so holding, the court below relied upon the plain language of the section, supporting its conclusion with excerpts from the decision of the Seventh Circuit in the case of *Avalon Amusement Corp.* v. *United States,* 165 F. 2d 653, wherein that court, likewise relying on the plain language of the section, squarely held that Section 1700(e)(1) was applicable to a dancing establishment practically identical with that of petitioners. Thus, the only two courts of appeal that have construed Section 1700 (e)(1) with respect to its applicability to dancing establishments such as that of petitioners, are in complete harmony of conclusion that the language of the section itself reasonably justifies a construction that brings such establishment within its purview. In the circumstances, the case does not warrant further review on the ground that the court below did not ascertain the intention of Congress by applying exclusively the technical rules of statutory construction to which petitioners point.

2. Petitioners contend here (Br. 39-53), as they did below, that their ballroom was not a "cabaret, or other similar place" within the meaning of Section 1700(e)(1). Assuming that petitioners' ballroom was not a cabaret in the ordinary sense

of that term, we believe, nevertheless, that the similarities between a cabaret and petitioners' establishment (R. 299) justified the conclusion of the court below that their establishment came within the purview of Section 1700(e)(1). There is no question, of course, that public dancing privileges were afforded by petitioners to their patrons in the ballroom in connection with the serving and selling of refreshments and merchandise, and that is enough to bring the establishment within the reach of the section. As the court below held, petitioners' dancing establishment came within the term "roof garden, cabaret, or other similar place," if for no other reason than that the section states that such term shall include any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, with the exceptions noted, are afforded patrons in connection with the serving or selling of food, refreshment, or merchandise. We believe that the construction placed on the section by the court below, and by the Seventh Circuit in the *Avalon* case, was correct, and, as both of those courts held, that Section 101.14 of Treasury Regulations 43 (1941 ed.), as amended by T. D. 5192 (1942-2 Cum. Bull. 249, *supra,* pp. 3-4), was designed reasonably to carry out the statute.

Considerable stress is laid by petitioners on the fact that the officials of the Bureau of Internal Revenue interpreted Section 1700(e)(1) as not

including dancing establishments such as that of petitioners for a considerable period of time after the section was amended in 1942 [3] by the addition of the definition of the term "roof garden, cabaret, or other similar place." And they contend that the section should now be construed in harmony with the previous administrative interpretation. The contention ignores the fact that both the court below and the Seventh Circuit have, in effect, found the previous administrative interpretation to be wrong. Since the original interpretation by the Bureau officials was wrong, it could not alter the statute. Thus, the present interpretation pointed the way for the first time to a correct administration of the section. Cf. *Manhattan Co.* v. *Commisioner*, 297 U. S. 129-135.

Petitioners make the further contention (Br. 68-70) that the holding of the trial court to the effect that petitioners' dancing establishment was an establishment dissimilar to a roof garden or cabaret constituted the determination of a question of fact which the court below was not authorized to disturb. The contention is without substance. The determination of the meaning of the words used in a statute is obviously not a finding of fact or a matter within the exclusive province of the trial court.

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[3] Revenue Act of 1942, Section 622, 56 Stat. 798.

CONCLUSION

There is no conflict of decisions. The decision of the court below is clearly correct, and further review is not warranted. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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MARCH 1951.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 932903 601

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. .....

GENERAL MOTORS CORPORATION,
Petitioner,

vs.

CHRIS BOLTEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Justices of the Supreme Court of the United States:

Petitioner respectfully prays this Honorable Court for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review a judgment entered on March 7th, 1950.

The Court of Appeals reversed the judgment of the District Court entered on petitioner's motion for summary judgment. It directed the District Court to allow Respondent to dismiss without prejudice.

The Court of Appeals by judicial fiat has stricken from Rule 41 (a) (2) of the Rules of Civil Procedure the clause denoting the District Court's discretionary power to specify in the order that the dismissal is with prejudice, viz:

Rule 41 (a) (2)

> "By order of court. * * * an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. * * * *Unless otherwise specified in the order,* a dismissal under this paragraph is without prejudice." (Emphasis supplied.)

The Court of Appeals held: (1) When respondent moved to dismiss "without prejudice and without costs" the District Judge was bound to permit dismissal without prejudice. (2) Rule 41 (a) (2) of the Rules of Civil Procedure empowered the court to fix terms of dismissal; but did not permit it to deny the motion. (3) For nineteen days before respondent moved to dismiss, the Judge had had under advisement petitioner's motion for summary judgment; the Court of Appeals held, however, that the motion to dismiss divested the District Judge of discretion except to fix the terms of dismissal (R. 49).

Petitioner represents to this court:

SUMMARY AND SHORT STATEMENT.

Respondent is a resident of Missouri (R. 2). Petitioner, a Delaware Corporation (R. 2), is amenable to court process in Missouri. Respondent sued petitioner on October 1, 1948 in United States District Court at Chicago (R. 2). He alleged: He was employed by Kelley Asbestos Products Company. While working for Kelley, he was injured in Petitioner's plant near Kansas City, Missouri, on July 2, 1946 (R. 2-3).

Petitioner pleaded: A. The Illinois two year statute of limitations; B. Respondent had received an award under the Missouri Workman's Compensation Act against Kelley Asbestos Products Company (R. 7-8).

Respondent filed thirty-two interrogatories for petitioner to answer (R. 4-6). Thirty-one required information availab'e in Missouri exclusively (R. 4-6).

Petitioner on November 12, 1948 moved for judgment (R. 9) on the ground actions for injury to the person are to "be commenced within two years next after the cause of action accrued." Ill. R. S. Chap. 83 Sec. 15 (R. 9). The District Court took the motion under advisement.

On December 1, after the court had had Petitioner's motion for summary judgment under advisement for nineteen days, Respondent moved to dismiss "without prejudice and without costs" (R. 10).

Respondent did not in his motion, nor at any time before judgment was entered, indicate to the court he was interested in a dismissal on terms other than "without prejudice and without costs" (R. 10).

On December 6, in support of his motion to dismiss "without prejudice and without costs", Respondent urged:

A. The Missouri statute of limitations was five years. Mo. R. S. 1939, Sec. 1014 (R. 11). Respondent would have until July 1, 1951 to commence his suit in Missouri.

B. The court in the alternative might transfer the cause to United States District Court at Kansas City, Missouri, under section 1404 of the Judicial Code. 28 U. S. C. A. 1404. (R. 12).

C. Respondent's recovery against his employer under the Missouri Workmen's Compensation Act alleged in Petitioner's answer (R. 7-8) does not bar an action against a third person.

Respondent cited the Missouri statute. Mo. R. S. 1939, Sec. 3699 (R. 12). Under this section the right of recovery is in the employer. After deducting the expense of suit and reimbursing himself for compensation paid, the employer pays the residue to the employee (See Appendix for statute, *infra* 17).

Respondent did not claim there was east of Missouri any witness for his case.

The judge held: Respondent selected the forum. The Court was obliged to apply the law as it exists in the district (R. 22-23). 81 F. Supp. 851.

On February 4, 1949, Respondent filed a motion to set aside the judgment. Respondent stated "that his motion for leave to dismiss without prejudice and without costs was inadvertently made, and should not have requested leave to dismiss without costs" (R. 24).

This motion was denied (R. 33).

In Missouri a judgment for defendant rendered in another jurisdiction on a plea of limitations is a defense to a second action. The rule applies even though the Missouri statute of limitations has not run when the second action is begun. *Fulton Iron Works* v. *Riggin*, 14 Mo. App. 321; *Wernse* v. *McPike*, 100 Mo. 476, 13 S. W. 809.

The Court of Appeals held: that Rule 41 (a) (2) of the Rules of Civil Procedure, 28 U. S. C. A. 723C, gives plaintiff an absolute right to dismiss restricted only by the requirement that it be upon order of the court and upon such terms and conditions as the court deems proper (R. 39). 180 F. (2) 379 at 381.

BASIS FOR JURISDICTION OF THIS COURT.

This Court has jurisdiction under Title 28, United States Code, Section 1254 (1).

THE QUESTIONS PRESENTED.

I.

Does not the italicized clause of the following provision of Rule 41 (a) (2) of the rules of Civil procedure:

> "By order of Court. * * * an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. * * * *Unless otherwise specified in the order,* a dismissal under this paragraph is without prejudice." (Emphasis supplied.)

denote that the judge may specify in the order that dismissal is with prejudice?

II.

When Respondent on December 1, 1948, moved to dismiss "without prejudice and without costs" (R. 10) did he thereby divest the district judge of discretion to rule on the motion for summary judgment which motion the court had had under advisement for nineteen days (R. 9)?

III.

When a motion to dismiss without prejudice is made under 41 (a) (2) of the Rules of Civil Procedure, does the District Court have any discretion to consider the merits of the motion, or is the District Court regardless of the merits of the motion bound to order dismissal on terms?

REASONS FOR ALLOWANCE OF WRIT.

I.

The Court of Appeals by construction has deleted from Rule 41 (a) (2) of the Rules of Civil Procedure the clause which we italicize:

> "By order of Court. * * * an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. * * * *Unless otherwise specified in the order,* a dismissal under this paragraph is without prejudice."

The clause was intended to denote a discretion in the District Judge to allow or not to allow a plaintiff to dismiss without prejudice. This important question of Federal law has not been but should be passed upon by this court.

II.

a. The Court of Appeals has construed Rule 41 (a) (2) of the Rules of Civil Procedure as requiring the District Court to allow a plaintiff to dismiss without prejudice at any time before final judgment. The decision conflicts with *U. S.* v. *Pacific Fruit* (1943 9 Cir.), 138 F. (2d) 367. In this latter case plaintiff unsuccessfully moved for a continuance. Plaintiff then asked leave to dismiss without prejudice. The Judge ruled that dismissal without prejudice would be on condition the Government pay a certain sum to the defendant as costs. Upon failure of the Government to pay, the court dismissed the action with prejudice. The Court of Appeals held that the order that the Government pay costs was void, that the Trial Judge under

Rule 41 (a) (2) was vested with discretion empowering him to deny the motion to dismiss without prejudice and to dismiss the cause on the merits.

The Court of Appeals for the Fourth Circuit in *Rollison* v. *Wash. Nat. Ins. Co.* (1949), 176 F. (2d) 364 at par. 4, p. 367 held that Rule 41 vests the District Court with discretion to deny a motion to dismiss without prejudice.

b. The ruling by the Court of Appeals that the District Judge was bound to allow dismissal without prejudice to permit respondent to file his action in Missouri is squarely in conflict with a decision by the Second Circuit prior to the adoption of the Rules of Civil Procedure.

In *Young* v. *Southern Pacific Co.* (1928), 25 F. (2d) 630 the proceeding had been removed from the State Court. The defendant moved to dismiss on the ground of laches. The court allowed complainant to dismiss without prejudice on payment of costs. Complainant intended to file suit in the State Court and vary the allegations so as to avoid removal. The Court of Appeals reversed, stating that the District Court should pass upon the motion to dismiss for laches.

Respectfully submitted,

GENERAL MOTORS CORPORATION,
a corporation,
Petitioner,

By ALVIN G. HUBBARD,
REESE HUBBARD and
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Its Attorneys.

HUBBARD, HUBBARD & DORGAN,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. .....

GENERAL MOTORS CORPORATION,
Petitioner,

vs.

CHRIS BOLTEN,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the District Judge is published in 71 F. Supp. 851. It is printed in the record (R. 22, 23). The opinion by the Court of Appeals is reported in 180 F. (2d) 379. It is in the record (R. 46).

JURISDICTION.

The court has jurisdiction under Title 28 United States Code, Sec. 1254.1.

STATEMENT OF CASE.

For brevity the Court is respectfully referred to the petition (*supra*, pp. 3-5).

SPECIFICATION OF ERROR.

1. The Court of Appeals erred in holding that under Rule 41 (a) (2) of the Rules of Civil Procedure, the District Court is bound to allow a plaintiff's motion to dismiss without prejudice.

2. The Court of Appeals erred in holding that the motion to dismiss without prejudice must be granted regardless of the state of the proceedings.

3. The Court of Appeals erred in reversing the judgment for petitioner.

SUMMARY OF POINTS.

I.

After the answer had been filed and the motion for summary judgment on the ground of limitations, had been under advisement for 19 days, the District Judge was vested with discretionary power to allow or to deny a motion for leave to dismiss without prejudice. The court might deny a dismissal, where the purpose was to institute another suit in another jurisdiction where the Statute of Limitations had not run.

U. S. v. *Pac. Fruit* (9th Cir. 1943), 138 F. (2d) 367.

Rollison v. *Wash. Nat. Ins. Co.* (1949, 4th Cir.), 176 F. (2d) 364 at 367.

Love v. *Mason* (1946 D. C. La.), 66 F. Supp. 753.

Henjes v. *Aetna Ins. Co.* (1941 D. C. N. Y.), 39 F. Supp. 418.

Wall v. *Conn. Mutual Life Ins. Co.* (1941 D. C. Ga.), 2 F. R. D. 244.

Cinn. Traction Bldg. Co. v. *Pullman Standard Car Co.* (D. C. Del., 1938), 25 F. Supp. 322.

Roth v. *Great Atlantic & Pacific Tea Co.* (D. C. Ohio, 1942), 2 F. R. D. 182.

Colonial Oil Co. v. *American Oil Co.* (D. C. S. C., 1943), 3 F. R. D. 29.

II.

After it appeared the motion for summary judgment was well founded, the court was not bound to permit the dismissal of the action without prejudice in the absence of any equitable circumstances warranting such dismissal.

International Shoe Co. v. *Cool* (1946, 8th Cir.), 154 F. (2d) 778 at 779, 780.

Young v. *So. Pacific Co.* (1928, 2nd Cir.), 25 F. (2d) 630.

ARGUMENT.

I.

When respondent made his motion to dismiss without prejudice and without costs, the court had had under advisement the motion for summary judgment for nineteen days. Respondent's motion was attended by no equitable circumstance. Respondent had admittedly recovered on his claim in Missouri. He did not explain why he in lieu of his employer was suing. Respondent had brought suit in Chicago far from the scene of the accident and the residence of the witnesses. On the record the defendant was entitled to judgment. Because the court was ready to pronounce judgment for defendant respondent then made his motion to dismiss.

Under the holding in *U. S.* v. *Pac. Fruit,* 138 F. (2d) 367, the court was vested with a discretion to allow or deny the motion. The same holding was made in *Rollison* v. *Wash. Nat. Ins. Co.,* 176 F. (2d) 364 at 367.

In *Love* v. *Mason,* 66 F. Supp. 753, defendant moved to dismiss on the ground of limitations. Plaintiff moved to dismiss without prejudice in order that he might commence a suit in a jurisdiction where the Statute of Limitations had not run. Judgment for defendant.

In *Henjes* v. *Aetna Ins. Co.,* 39 F. Supp. 418 the court denied the motion to dismiss without prejudice because it appeared that the plaintiff intended to institute another action.

In *Wall* v. *Conn. Mutual Life Ins. Co.,* 2 F. R. D. 244 the plaintiff stated that she had made a technical error in having the *ad damnum* more than $3,000. The court denied the motion to dismiss without prejudice on the ground that

the plaintiff was going to institute another action in another court.

In *Cinn. Traction Bldg. Co.* v. *Pullman Standard Car Co.*, 25 F. Supp. 322, the court denied a motion to dismiss without prejudice on the ground the defendant had spent considerable time and money for preparation and was entitled to have the matter decided.

In *Roth* v. *Great Atlantic & Pacific Tea Co.*, 2 F. R. D. 182 the Supreme Court of Ohio rendered a decision bearing upon the merits of controversy. Defendant moved for summary judgment. Plaintiff moved to dismiss without prejudice at plaintiff's costs. The court granted the motion for summary judgment.

In *Colonial Oil Co.* v. *American Oil Co.*, 3 F. R. D. 29 the plaintiff filed suit in the District Court, obtained a judgment on a verdict which was reversed because of the court's instruction on punitive damages. Plaintiff moved to dismiss without prejudice. Denying the motion the court held that Rule 41 (a) (2) made dismissal without prejudice discretionary.

The practice has been uniform that plaintiff does not have a right to dismiss after answer has been filed. The matter rests in the sound discretion of the trial court taking into consideration all the facts and circumstances. The end of Rule 41 (a) (2)—"*Unless otherwise specified in the order,* a dismissal under this paragraph is without prejudice."—clearly evinces a discretionary power in the court to specify in the order that the dismissal is with prejudice.

II.

When the motion for leave to dismiss without prejudice and without costs was made, the District Court had had under advisement a motion for summary judgment for nineteen days. The petitioner was clearly entitled to judgment upon its motion.

In *International Shoe Co.* v. *Cool,* 154 F. (2d) 778, the court allowed dismissal without prejudice after it had indicated that it would direct a verdict. The Court of Appeals relying upon Rule 41 (a) (2) stated that the discretion was not an arbitrary one. It reversed the judgment directing the District Court to enter judgment dismissing plaintiff's action on its merits.

In *Young* v. *So. Pacific Co.,* 25 F. (2d) 630 the court allowed the motion to dismiss without prejudice when it had under advisement defendant's motion to dismiss on the ground of laches. The Court of Appeals for the Second Circuit held this was reversible error.

No case cited by the Court of Appeals construes Rule 41 (a) (2) as requiring the District Court to allow dismissal without prejudice (R. 48, 49, 50).

In *Hydraulic Press Mfg. Co.* v. *Williams White Mfg. Co.,* 165 F. (2d) 489, (R. 48), the court denied plaintiff's motion to dismiss without prejudice. The Court of Appeals affirmed.

In *Home Owners Loan Corp.* v. *Hoffman,* 134 F. (2d) 314 (R. 48), the District Judge permitted the plaintiff to dismiss without prejudice. The Court of Appeals reversed, holding that the District Judge abused his discretion in not requiring the plaintiff to pay costs. Insofar as the Court of Appeals discussed the question here involved, the opinion conflicts with the opinion of the Seventh Circuit.

Insofar as *Reardon* v. *Chapman,* 169 F. (2d) 909, (R. 49), bears on the question here involved, it is diametrically contrary to the holding of the Court of Appeals herein.

Titus v. *Wells Fargo, etc.,* 134 F. (2d) 223 (R. 50), involved an agreement made in California not to plead the Statute of Limitations. The agreement was enforceable in California. It was enforceable in Washington, D. C. where the parties were resident. The Court of Appeals held that in the State of Texas where the suit was begun, such agreement was contrary to public policy. It reversed the judgment in plaintiff's favor remanding the case, stating that the District Court should allow a dismissal. No motion was ever made to dismiss without prejudice. Rule 41 (a) (2) of the Rules of Civil Procedure was never mentioned.

Thus we respectfully submit that the judgment of the Circuit Court of Appeals for the Seventh Circuit is clearly erroneous, that it establishes a precedent which will create confusion, and it should be reversed.

Respectfully submitted,

GENERAL MOTORS CORPORATION,
a corporation,
Petitioner,

By ALVIN G. HUBBARD,
REESE HUBBARD and
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APPENDIX.

MISSOURI REV. STAT. 1939, SEC. 1014:

"Where a third person is liable to the employee * * * for the injury, * * * the employer shall be subrogated to the right of the employee * * * against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee, but such employer may recover any amount which such employee * * * would have been entitled to recover. Any recovery by the employer against such third person, in excess of the compensation paid by the employer, after deducting the expenses of making such recovery shall be paid forthwith to the employee * * *, and shall be treated as an advance payment by the employer, on account of any future installments of compensation."